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In the Supreme Court of the United States

OCTOBER TERM, 1997

RESEARCH TRIANGLE INSTITUTE, PETITIONER

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM AND
THE UNITED STATES OF AMERICA

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress has waived the government's sovereign immunity with respect to petitioner's suit in federal district court against the Federal Reserve Board for contract damages.

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1719

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 132 F.3d 985. The opinion of the district court (Pet. App. 13a-21a) is reported at 962 F. Supp. 61.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1997. On March 20, 1998, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 28, 1998, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 1987, respondent the Board of Governors of the Federal Reserve System (the Board) requested bids on a contract to conduct a survey to determine the institutional sources and geographic areas from which small businesses obtain financial services. In February 1988, the Board selected petitioner to perform the survey for a fixed price of $572,763. Agreed modifications later increased the contract price to $615,851. In May 1989, the Board's staff denied petitioner's request for a further increase of $284,079. The Board rejected petitioner's administrative appeal of that decision in February 1990. Pet. App. 4a, 15a-16a & n.1.

In February 1996, petitioner filed this suit in district court seeking damages from the Board and the United States for breach of contract. See Pet. App. 4a, 16a. Petitioner contended that the court had jurisdiction under 28 U.S.C. 1331, which confers jurisdiction over "civil actions arising under the * * * laws * * * of the United States," and 12 U.S.C. 632, which provides that any civil case "to which any Federal reserve bank shall be a party shall be deemed to arise under the laws of the United States." See Pet. App. 20a. The court rejected that argument, holding that Section 1331 did not embody a general waiver of sovereign immunity, and that Section 632's grant of jurisdiction over suits involving reserve banks could not be extended to the "clearly separate" entity of the Board. *Id.* at 20a-21a. The court further agreed with petitioner's concession that neither the Tucker Act, 28 U.S.C. 1491, nor the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, applied to the Board; and it rejected petitioner's argument that, because any

judgment against the Board would be paid out of funds that were not directly appropriated by Congress, sovereign immunity should not apply to the Board. Pet. App. 17a-19a. The court accordingly granted the government's motion to dismiss petitioner's complaint for lack of subject matter jurisdiction. *Id.* at 21a.

The court of appeals affirmed. Pet. App. 1a-12a. The court first observed that the sovereign immunity of the United States and its instrumentalities "is presumed and cannot be overcome without an express and unequivocal statutory waiver," and that any such waiver is to be "strictly construed, with all ambiguities resolved in favor of the sovereign." *Id.* at 4a-6a. The court then rejected petitioner's argument, made for the first time in the court of appeals, that, because of the Board's relationship to the various federal reserve banks, "the Board, for which there is no express statutory waiver of immunity, should be included within the waiver for the [reserve banks] provided by 12 U.S.C. § 341." *Id.* at 7a-9a.[1] Noting that the Board and the reserve banks it oversees are created and empowered by separate statutory provisions, the court refused to "conflate the powers of two expressly independent statutory entities." *Id.* at 8a-9a.

The court also rejected (Pet. App. 9a-10a) petitioner's argument that the Tucker Act, which authorizes suits on contract claims for damages against the United States (see 28 U.S.C. 1491(a)(1)), should ex-

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[1] Section 341 enumerates the general powers conferred by Congress on federal reserve banks, including the power "[t]o sue and be sued, complain and defend, in any court of law or equity."

tend to suits against the Board. First, the court reasoned that the Tucker Act generally confers jurisdiction only over suits against "agencies that operate using [congressionally] appropriated funds" (Pet. App. 6a), and the Board is not such an agency because 12 U.S.C. 244 "clearly states that the money used to fund the Board (assessments from Federal Reserve banks) 'shall not be construed to be Government funds or appropriated moneys'" (*id.* at 9a). Second, the court pointed out (*id.* at 10a) that even if the Tucker Act did apply to suits against the Board, it would confer jurisdiction only on the Court of Federal Claims and not on the instant suit in federal district court.

Finally, the court declined to find an implied waiver of sovereign immunity permitting suits against the Board, arising either from the logic of this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), or from Congress's grant of independent litigating authority to the Board in 12 U.S.C. 248(p). The court rejected petitioner's claim that *Winstar* established the broad proposition "that sovereign immunity should not be used to frustrate the reasonable expectations of private parties who contract with the government," noting that *Winstar* "did not involve the waiver of sovereign immunity," which "had been clearly waived" in that case. Pet. App. 10a. And the court found that the statutory authority of the Board to "act in its own name and through its own attorneys" in various legal proceedings did not constitute the sort of "clear, express, and unequivocal" waiver of sovereign immunity that would be necessary to confer jurisdiction over a suit against the Board. *Id.* at 11a-12a.

ARGUMENT

The court of appeals correctly held that no statute waives the government's sovereign immunity with regard to a contractor's suit in federal district court for money damages arising out of a contract with the Federal Reserve Board. The court's decision created no new law in this area and does not conflict with any decision of this Court or of any other court of appeals. The petition therefore presents no issue warranting this Court's review.

1. Petitioner first contends (Pet. 6-9) that the usual principles of sovereign immunity, requiring a "clear, express, and unequivocal" waiver of immunity before a suit may proceed against the United States or one of its instrumentalities, do not apply in cases involving "'commercial' contracts of governmental agencies" (Pet. 6). That is not correct. In contract cases, as in all others, "the United States, as sovereign, is immune from suit save as it consents to be sued[,] and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Hercules, Inc.* v. *United States*, 516 U.S. 417, 422 (1996) (internal quotation marks and ellipsis omitted); *United States* v. *Sherwood*, 312 U.S. 584 (1941); see also, *e.g.*, *Kiowa Tribe* v. *Manufacturing Technologies, Inc.*, 118 S. Ct. 1700 (1998) (Indian Tribe's sovereign immunity bars suit for breach of commercial contract); *In re Ayers*, 123 U.S. 443, 505 (1887) (because of sovereign immunity, a "contract [with a State] is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion").

Petitioner cites cases involving statutory "sue and be sued" clauses, which the Court has generally construed as broad waivers of sovereign immunity. See *FDIC* v. *Meyer*, 510 U.S. 471, 475-483 (1994); *Loeffler* v. *Frank*, 486 U.S. 549 (1988); *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940). As this Court has observed, however, those cases "do not * * * eradicate the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (internal quotation marks and citation omitted). The critical question in this case is therefore not whether the Board entered into a "'commercial' contract[]" with petitioner (Pet. 6), but whether Congress has expressly made the Board amenable to suit.

Petitioner concedes (Pet. 10) that the statutory provisions governing the Board do not contain a "sue and be sued" clause. It contends, however, that the general provisions of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, and the authority to "sue and be sued" conferred by statute on individual federal reserve banks, 12 U.S.C. 341 (Fourth), should be "construed together" to preclude the Board from asserting sovereign immunity as a defense to an action for breach of contract. Pet. 12-13.

The statutory provisions on which petitioner relies do not support its waiver argument. If the Contract Disputes Act applied to this case, it would authorize only an action in the Court of Federal Claims (brought within 12 months of an adverse decision by a contracting officer), or review of the decision of an agency board of contract appeals by the Court of Appeals for the Federal Circuit (brought within 120

days of the agency board's decision). 41 U.S.C. 607(g), 609(a); see 28 U.S.C. 1491(a)(1). Petitioner filed this action in district court, some six years after the Board's final denial of its request for administrative relief.

Nor can a waiver of the Board's immunity be derived from the authority of individual Federal Reserve banks to "sue and be sued," 12 U.S.C. 341, because, as the court of appeals recognized (Pet. App. 8a), the Board "has an expressly independent statutory existence from the Federal Reserve banks it oversees."[2] Indeed, the fact that Congress expressly gave the individual banks the power to "sue and be sued", 12 U.S.C. 341, supports the conclusion that Congress intentionally withheld that power from the Board when it enumerated the Board's powers elsewhere in the same Act, 12 U.S.C. 248. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown* v. *Gardner*, 513 U.S. 115, 120 (1994), quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

Petitioner can point to no statutory waiver of sovereign immunity that applies to this proceeding.[3] The

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[2] The Board is a regulatory entity established by, and granted enumerated powers in, Sections 10 and 11 of the Federal Reserve Act, ch. 6, 38 Stat. 260, 261 (1913), codified (as amended) at 12 U.S.C. 241-248. The federal reserve banks are federally chartered corporate entities whose existence and powers are governed by separate provisions of the Act, codified (as amended) at 12 U.S.C. 281-360.

[3] The Board is subject to suit in certain cases, not relevant here, under general congressional waivers of sovereign immu-

court of appeals therefore correctly affirmed the district court's dismissal of petitioner's suit for lack of jurisdiction.

2. The decision below does not conflict with either *McDonald's Corporation* v. *United States*, 926 F.2d 1126 (Fed. Cir. 1991), or *L'Enfant Plaza Properties, Inc.* v. *United States*, 668 F.2d 1211 (Ct. Cl. 1982). See Pet. 13-16. Neither of those cases involved the Board; and both involved construction of the Tucker Act, 28 U.S.C. 1491, which is not applicable to this case for reasons set forth in note 3, *supra*. Moreover, the reasoning of each case fails to support petitioner's claim.

McDonald's held that when Congress expressly authorized suits against "Navy Exchanges" for contract damages under the Tucker Act, it implicitly also authorized such suits against the Navy Resale and Services Support Office (NAVRESSO), a "'central management office' for the Navy resale system."

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nity. See 5 U.S.C. 701 (Administrative Procedure Act); 28 U.S.C. 1346(b), 2671 *et seq.* (Federal Tort Claims Act). The Tucker Act, 28 U.S.C. 1491, which grants the Court of Federal Claims jurisdiction over various non-tort claims against the government, does not confer jurisdiction here for two reasons. First, it has been construed not to extend, absent some specific statutory provision, to contract claims against instrumentalities that are not funded through congressional appropriations. See *United States* v. *Hopkins*, 427 U.S. 123, 125 & n.2 (1976). The Board is not funded through appropriations, see 12 U.S.C. 243-244 (Board to be funded by assessments on reserve banks, which "shall not be construed to be Government funds or appropriated moneys"), and no special jurisdictional provision applies. See 28 U.S.C. 1491(a)(1). Second, as in the case of the Contract Disputes Act, even if the Tucker Act were applicable it would confer jurisdiction only on the Court of Federal Claims and not on the district court. See 28 U.S.C. 1346(a)(2).

926 F.2d at 1127, 1129, 1133. The court found that NAVRESSO was the functional equivalent of the purchasing arm of the Navy Exchanges. Nothing in that decision compels the conclusion that the Federal Reserve Board is likewise merely an arm of the Federal Reserve Banks which it regulates, or conflicts with the conclusion of the court below that the Board and the banks are "two expressly independent statutory entities" so that a waiver of immunity for the banks does not extend to the Board. Pet. App. 9a.

L'Enfant Plaza Properties held that while the Tucker Act waiver of immunity generally extends only to agencies that spend appropriated funds (and to certain other agencies identified by name, such as the Navy Exchanges), that limitation did not shield the Comptroller of the Currency from suit, because funding of the Comptroller's activities was not sufficiently clearly "separated from general federal revenues." 668 F.2d at 1212. Whatever the merits of that decision, its reasoning does not, as the court of appeals recognized (Pet. App. 9a-10a), compel the same conclusion with respect to the Board, which is governed by very different statutory provisions. Compare, *e.g.*, 12 U.S.C. 1 ("There shall be in the Department of the Treasury a bureau * * * the chief officer of which * * * shall be called the Comptroller of the Currency, and shall perform his duties under the general directions of the Secretary of the Treasury.") with 12 U.S.C. 241 (creation of Board as independent entity); see also 668 F.2d at 1212 (noting that the Comptroller's Office received appropriations through 1947).

Moreover, as the court below also observed (Pet. App. 10a), the reasoning of *L'Enfant Plaza Properties*

could at most justify an assertion of jurisdiction only by the Court of Federal Claims in a case brought under the Tucker Act, not by a district court in a case brought under 28 U.S.C. 1331.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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